In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 565

MONROE AUTO EQUIPMENT COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

The Federal Trade Commission brought this proceeding under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)), charging petitioner ("Monroe") with practicing illegal price discrimination among jobbers who handle its merchandise. Section 2(a) makes it "unlawful for any person engaged in commerce * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality * * * where the effect of such discrimination may be substantially to lessen competition * * *."

799-214—66

Monroe manufactures automobile replacement parts. It sells these parts to so-called warehouse-distributors, who sell them to jobbers who, in turn, distribute the parts among retail dealers. All warehouse-distributors who resell Monroe parts to "approved" jobbers at Monroe's suggested "net jobber" prices [1] pay the same price to Monroe. This price is 20 percent less than the suggested "net jobber" price which jobbers pay to the warehouse-distributors, the 20 percent differential representing the warehouse-distributors' compensation (Pet. App. 66–67 [2]).

The Commission's charges of discrimination arise out of the following additional facts: Some of the warehouse-distributors in Monroe's chain of distribution own or control approved jobbers. Some approved jobbers, on the other hand, own or control warehouse-distributors. These "affiliated" jobbers who either control, or are controlled by, warehouse-distributors are in direct competition with "independent" jobbers who have no ownership affiliation with warehouse-distributors and who constitute by far the majority of the jobbers. The independent jobbers pay the suggested "net jobber" price for Monroe's merchandise. The affiliated jobbers also formally pay that price when buying from the warehouse-distributors with whom they have affiliation, but such warehouse-distributors receive the standard 20 percent resale discount on the goods (Pet. App. 67–68).

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[1] Such resales to "approved" jobbers at Monroe's suggested prices are the only ones involved in this case.

[2] "Pet. App." refers to petitioner's appendix in the court of appeals.

On the basis of these facts, the Commission found that Monroe was engaging in price discrimination among purchasers of Monroe's products within Section 2(a)—specifically, that such discrimination existed with regard to jobbers handling Monroe merchandise. The Commission first found that all approved jobbers—whether "independent" or affiliated with warehouse-distributors—were "purchasers" from Monroe within the meaning of Section 2(a). It found the "independent" jobbers to be "indirect" purchasers from Monroe through the warehouse-distributors with whom such jobbers deal because "[t]he prices, terms and conditions of sale used by both the * * * [warehouse-distributor] and the jobber are fixed by the manufacturer [Monroe] or are subject to its approval. See *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104 (2d Cir. 1962) cert. denied, 371 U.S. 824 (1962)" (Pet. App. 18). The affiliated jobbers were found to be "direct" purchasers from Monroe because "the entity composed of * * * [warehouse-distributor] and jobber is a direct purchaser" (Pet. App. 19).

The Commission then held that "the sole remaining question is whether there is sufficient identification of the * * * [warehouse-distributor] with the jobber to give rise to the conclusion that a discount given to one will inure to the benefit of the other" (*ibid.*). The Commission found that, "in the light of the business realities shown on this record," a "direct benefit" would inure to the affiliated jobbers (Pet. App. 25) and that these facts "amount to a prima facie show-

ing of price discrimination among competing [jobber] customers" which Monroe had not rebutted. Finally, the Commission adopted the examiner's conclusion that the effect of these discriminations may be substantially to lessen or injure competition between the affiliated and unaffiliated jobbers (Pet. App. 13, 26). The Commission entered an order directing Monroe to cease and desist "from discriminating in the price of * * * products of like grade and quality * * * [b]y selling such products to any purchaser at net prices higher than its net prices charged any other purchaser who competes in the resale or distribution of such products with the purchaser paying the higher price" (Pet. App. 15).[2]

The court of appeals affirmed on the ground that the Commission's findings were supported by substantial evidence (Pet. 1a–7a).

DISCUSSION

The Solicitor General has authorized the Federal Trade Commission to file a separate brief in opposition to the petition for a writ of certiorari in this case. While the Solicitor General agrees with the Commission that the present case does not warrant further review, he deems it appropriate to file this memorandum because, in his view, the Commission's decision suggests an interpretation of the Robinson-Patman Act that could impose serious and perhaps unjustifiable limitations upon economically beneficial vertical

[2] Commissioner Dixon filed a concurring opinion (Pet. App. 27) and Commissioner Elman dissented (Pet. App. 31).

integration of concerns engaged in the wholesale and retail distribution of merchandise.

The Commission's decision that Monroe violated Section 2(a) of the Robinson-Patman Act depends upon its conclusions that Monroe has discriminatorily conferred an economic benefit upon some of its jobbers (the "affiliated" jobbers) which it denies to others (the "independent" jobbers) and that the effect of this benefit may be substantially to lessen competition among jobbers. In the Commission's view, prohibited discrimination existed because the evidence established that affiliated jobber-warehouse-distributors "operate as a single unit so that any benefit conferred on one would in the light of the business realities shown on this record, result in a direct benefit to the other" (Pet. App. 25). Since all warehouse-distributors received a benefit—the 20 percent resale discount—not given to independent jobbers, the Commission concluded that the jobbers affiliated with warehouse-distributors received a prohibited economic benefit which the independent jobbers did not receive.

The Commission's analysis in this case thus seems to rest upon the assumption that, where a substantial ownership affiliation exists between a warehouse-distributor and a jobber, all or substantially all of the 20 percent resale discount to the warehouse-distributor will constitute economic benefit to the affiliated jobber, with resultant anticompetitive effects. The 20 percent discount, however, is nominally given in return for the performance of warehousing and distributing functions which would otherwise have to be performed

by Monroe. The Commission's opinion does not suggest that these functions are not carried out by warehouse-distributors when they resell to affiliated jobbers; nor does it suggest that the 20 percent discount exceeds the normal costs of warehousing and distributing in the industry.

Should the 20 percent discount reflect the normal costs of warehousing and distributing on sales to affiliated jobbers, it would be difficult indeed to conclude that competitive injury cognizable under the Robinson-Patman Act has resulted. On the other hand, if the difference which Monroe maintains between the resale price to jobbers and its price to warehouse-distributors[4] is greater than is warranted by the function performed by the warehouse-distributor, vertical integration between a jobber and a warehouse-distributor might well result in a substantial competitive advantage to affiliated jobbers as compared with independent jobbers who are forced to pay an unreasonably high price increment to the warehouse-distributors from whom they buy.

These issues, when properly presented, deserve consideration and analysis. The Commission did not make what we consider to be the relevant inquiries here, possibly because the record in this case may not have seemed to require it. However, if the Commission intends to rely entirely upon a formal analysis which assumes that an unlawful competitive advantage would

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[4] The Commission here found that the "prices, terms and conditions of sale used by both the * * * [warehouse-distributor] and the jobber are fixed by * * * [Monroe] or are subject to its approval" (Pet. App. 18).

be gained *per se* by a jobber with ownership affiliation with a warehouse-distributor, regardless of whether the price differential maintained between jobbers and warehouse-distributors reflects normal distribution costs, serious questions would be raised; such an application of the Robinson-Patman Act might well discourage vertical integration in the distribution process even where it yields beneficial economies and results in no undue injury to competition.

The Solicitor General nevertheless agrees with the Commission that the present case is not an appropriate one for review here. The relevant factual information is not discussed in the Commission's opinion; nor did the petitioner attempt to develop such information in the administrative proceeding. The record therefore does not satisfactorily present the legal issues. The legal questions are, moreover, neither explored nor illuminated in the court of appeals' opinion, which affirmed the Commission on the basis of the substantial evidence rule. We note further that in a recent opinion dealing with another, and possibly more significant, form of vertical integration—the formation of cooperatives of retail or jobbing outlets for the purpose of performing the warehousing or wholesaling function for the members of the cooperative—the Commission has extensively explored the relevant facts on remand from the Court of Appeals for the Ninth Circuit (see *Alhambra Motor Parts* v. *Federal Trade Commission,* 309 F. 2d 213, *Alhambra Motor Parts,* FTC Docket No. 6889, issued January 3, 1966). And in *Purolator Products, Inc.*

v. *Federal Trade Commission*, No. 14704, C.A. 7, decided October 22, 1965, the Court of Appeals for the Seventh Circuit has, more recently than in the present case, engaged in a more extensive analysis of the relevant legal issues. In these circumstances, review of the underlying issues here would, we believe, be premature.

Respectfully submitted.

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